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No. 88-197

In the Supreme Court of the United States

OCTOBER TERM, 1988

ITHACA INDUSTRIES, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which requires employers to reasonably accomodate the religious beliefs of their employees unless such accommodation would cause undue hardship, by discharging an employee who refused to work on Sunday for religious reasons.

2. Whether Title VII's reasonable accommodation requirement, 42 U.S.C. 2000e(j), violates the Establishment Clause.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-13a) is reported at 849 F.2d 116. The panel opinion of the court of appeals (Pet. App. 15a-25a) is reported at 829 F.2d 519. The opinion of the district court (Pet. App. 26a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on June 8, 1988. The petition for a writ of certiorari was filed on August 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Ithaca Industries, Inc., operates a plant in Gastonia, North Carolina, that produces cloth. Dannel

Dean has been a member of the Church of God since 1977 and commenced employment at the plant in 1979, at which time he informed petitioner that he could not work on Sunday because it would violate his religious beliefs. Petitioner informed Dean that working on Sunday was not required. During 1984, however, production demands compelled petitioner to operate its plant on eight Sundays, albeit with a reduced staff. There were approximately 25 employees, including Dean, in the first shift and petitioner needed 12 to 15 of those employees to work each Sunday. Pet. App. 2a-3a, 27a-28a.

Dean's supervisor, Andrew Cain, attempted to meet the plant's needs by obtaining volunteers from those working in the first shift. In the absence of sufficient volunteers for any particular Sunday, Cain directed an individual employee to work after considering whether the employee had previously worked on Sunday, the number of hours the employee had already worked that week, and the relationship of the employee's skills to the work needed on Sunday. Dean declined requests by Cain to work on the first two Sundays that Sunday work was required, January 23 and February 19, 1984. Dean also refused Cain's request of March 17, 1984, to work the next day, which was a Sunday, and explained to Cain that it would violate his religious beliefs to work on that day. Cain did not inform Dean that his absence would be considered unexecused until the following Monday, when he also notified Dean that "[a]nother unexcused absence will result in termination" (Pet. App. 3a). On the Saturday before the next Sunday on which work was needed, April 1, 1988, Cain again asked Dean to work the next day. When Dean refused on religious grounds, Cain responded that Dean would be fired if he failed to work the next day (Sunday). Dean did not work on Sunday and petitioner discharged him on Monday, April 2, 1988. Pet. App. 3a, 28a-32a.

On April 3, 1984, Dean filed an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner had failed to reasonably accommodate his religious beliefs, as required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j). The EEOC investigated Dean's charge and found that there was reasonable cause to conclude that petitioner had violated Title VII. Accordingly, on December 16, 1985, the EEOC brought this action in the United States District Court for the Western District of North Carolina, alleging that petitioner had violated Title VII by discharging Dean because he refused to work on Sunday. Pet. App. 3a, 27a.

2. The district court dismissed the complaint (Pet. App. 26a-36a). The court determined that petitioner "had not offered an accommodation to Dean, because Dean absolutely refused to work on any Sunday or at any time on Sunday" (*id.* at 34a). According to the court, petitioner did not thereby violate Title VII, however, because "Dean's demands could not 'reasonably' be accommodated by [petitioner]" (*id.* at 35a). Congress did not intend by "reasonable accommodation," the court explained (*ibid.* (emphasis omitted)), "that an employer must deny the shift and job preferences of some employees, in order to accommodate or prefer the religious need of Dean." Because the district court agreed with petitioner that Title VII had not been violated, the court declined to consider petitioner's alternative contention that Title VII's reasonable accommodation requirement violates the Establishment Clause (*id.* at 35a-36a).

3. The court of appeals initially affirmed (Pet. App. 15a-25a) by a divided vote,[1] but the court subsequently granted rehearing en banc and reversed (*id.* at 1a-13a).

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[1] Judge Hall filed a dissenting opinion (Pet. App. 23a-24a).

The en banc court held that "[t]he district court's conclusion that unless Dean was willing to compromise his religious belief by agreeing to work Sundays on some occasions, [petitioner] had no duty to attempt to accommodate the belief turns the statute on its head. It improperly places the burden on the employee to be reasonable rather than on the employer to attempt accommodation. Section 701(j) clearly anticipates that some employees will absolutely refuse to work on their Sabbath and that this firmly held religious belief requires some offer of accommodation by employers." Pet. App. 5a.

The court also concluded that petitioner had failed to meet its reasonable accommodation obligation (Pet. App. 5a-7a). Although petitioner "did demonstrate an effort to accommodate *all* their employees when Sunday work was assigned," petitioner's accommodations "were clearly not for reasons of religion, nor were they specifically aimed at addressing Dean's beliefs" (*id.* at 6a) (emphasis in original and footnote omitted). Nor had petitioner sought to utilize any of the methods for obtaining other volunteer workers suggested by applicable EEOC guidelines (*ibid.*).

The court likewise rejected petitioner's claim that Title VII's reasonable accommodation obligation violates the Establishment Clause (Pet. App. 7a). Agreeing with every other court of appeals to reach the issue, the court held that the requirement of reasonable accommodation satisfies the three-prong test established by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The court accordingly remanded the case to the district court for a determination of appropriate relief (Pet. App. 7a).

Judge Wilkins dissented (Pet. App. 8a). The dissent stated that it would adhere to the court's prior decision in *Jordan* v. *North Carolina Nat'l Bank*, 565 F.2d 72 (4th Cir. 1977), which, according to the dissent, held that an

absolute refusal to work on the Sabbath is beyond reasonable accommodation under Title VII (Pet. App. 8a). The dissent also faulted the majority for remanding the case to the district court for the sole purpose of determining the appropriate relief. Because the district court's factual findings had been influenced by its adherence to *Jordan*, the dissent explained, the case should instead be remanded to allow the district court to reconsider the testimony and the evidence in light of the court of appeals' subsequent overruling of *Jordan* on appeal (*id.* at 13a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Contrary to petitioner's claim (Pet. 7-8), Title VII's reasonable accommodation requirement does apply where, as in this case, an employee refuses to work on his Sabbath for religious reasons. Indeed, as the court of appeals explained (Pet. App. 4a-5a), Congress adopted the reasonable accommodation requirement for the very purpose of "protect[ing] Sabbath observers whose employers fail to adjust work schedules to fit their needs" (*id.* at 4a (footnote omitted); see 118 Cong. Rec. 705-706 (1972) (remarks of Sen. Randolph); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 73-75 (1977)).

Petitioner's related claim (Pet. 8), moreover, that "Title VII does not include a mandated religious preference" misapprehends the purpose and the extent of Title VII's reasonable accommodation requirement. The fundamental premise of the reasonable accommodation obligation is that facially equal treatment, alone, is not necessarily sufficient under Title VII. Hence, an employer, like petitioner

in this case, that discharges an employee who refuses for religious reasons to work on certain days of the week cannot defend the discharge solely on the ground that all employees are subject to the same employment requirements and penalties.

Instead, an employer must satisfy Title VII's reasonable accommodation obligation in one of two ways. The employer may, as in *Ansonia Bd. of Educ.* v. *Philbrook,* No. 85-495 (Nov. 17, 1986), slip op. 7-9, eliminate the conflict between employment requirements and the employee's religious practices in a manner that reasonably preserves the employee's employment opportunities or job status.[2] Or, as in *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63 (1977), the employer may establish that "all conceivable accommodations would result in undue hardship," such as the imposition of significant burdens on other employees (*Ansonia,* slip op. 5-6).

As the court of appeals found, petitioner failed to make either showing. First, while petitioner made some effort to accommodate the interest of all employees, including Dean, in not working on Sunday, petitioner did not provide an accommodation that eliminated the conflict between Dean's employment responsibilities and his religious

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[2] This Court in *Ansonia* concluded that the employer policy in that case, "requiring [the employee] to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one" because "[t]he provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work" (slip op. 9). The Court nonetheless held that further factual inquiry was required in *Ansonia* because "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones" and the record in the case was not sufficiently clear to deny that possibility (*id.* at 9-10 (emphasis in original)).

beliefs. Petitioner's proffered accommodation still required Dean to work in contravention of his religious beliefs and thus ultimately caused his dismissal. Second, petitioner did not alternatively justify its failure to eliminate the conflict by showing that any conceivable reasonable accommodation would cause it "undue hardship" or adversely affect the employment status of other employees. For instance, as described by the court of appeals (Pet. App. 6a-7a & n.5), petitioner never attempted to utilize any of the possible accommodations suggested by EEOC guidelines, including either "the use of voluntary substitutes with substantially similar qualifications by publicizing policies, promoting an atmosphere in which substitutions are favorably regarded * * * ", or "flexible scheduling by means of floating or optional holidays." See 29 C.F.R. 1605.2(d)(1)(i)-(ii). Instead, petitioner declined to look for volunteers outside the first shift of employees, never offered Dean the option of seeking a qualified substitute, and neither used the bulletin board itself to seek Sunday volunteers nor allowed employees to post their own notices on the board in an effort to secure replacements (Pet. App. 6a n.4). Nothing in the record suggests that any of these possible efforts at accommodations would have imposed undue hardship on the employer or would have adversely affected the employment status of other employees.

For this reason, petitioner's repeated reliance (Pet. 7, 8-9) on this Court's decision in *Trans World Airlines, Inc.* v. *Hardison, supra,* is misplaced. The court of appeals' decision does not, contrary to *Hardison,* 432 U.S. at 85, "require an employer to discriminate against some employees in order to enable others to observe their Sabbath." Nor does the court of appeals' judgment in this case rest on a ruling that "across-the-board accommodation is inferior accommodation" (Pet. 8-9). In *Hardison,*

unlike this case, the employer established that all conceivable accommodations would result in undue hardship, including the imposition of undue burdens on the employment status of other employees. Petitioner has made no such showing here.

Finally, petitioner erroneously argues (Pet. 9-10) that the court of appeals "conducted an improper de novo review" of the district court's finding that petitioner had not engaged in discrimination in violation of Title VII. In contrast with the court of appeals' decision in *Anderson* v. *City of Bessemer City,* 470 U.S. 564 (1985), however, the court of appeals did not reject any of the district court's factual findings. The court instead simply rejected the district court's erroneous legal conclusion that an employee's absolute refusal to work on his Sabbath was not subject to the reasonable accommodation obligation.[3]

2. The court of appeals also correctly rejected petitioner's claim that Title VII's reasonable accommodation requirement does not violate the Establishment Clause. " 'This Court has long recognized that the government may * * * accommodate religious practices and that it may do so without violating the Establishment Clause.' " *Corporation of the Presiding Bishop* v. *Amos,* No. 86-179 (June 24, 1987), slip op. 6 (quoting *Hobbie* v. *Unemployment Appeals Comm'n,* No. 85-993 (Feb. 25, 1987), slip op. 8). Title VII's reasonable accommodation requirement is just such a permissible governmental accommodation of religion.

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[3] The court of appeals relied (Pet. App. 4a-5a) on the district court's determination (*id.* at 34a) that "[t]he [petitioner] here had not offered an accommodation to Dean, because Dean absolutely refused to work on any Sunday or at any time on Sunday."

Indeed, as every court of appeals to address the issue has concluded,[4] Title VII's reasonable accommodation requirement easily satisfies this Court's three-prong test for determining whether particular governmental action offends Establishment Clause concerns. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). It has a "secular legislative purpose" and a "principal or primary effect * * * that neither advances nor inhibits religions," and it does "not foster 'an excessive government entanglement with religion' " (*ibid.*, quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 674 (1970)).

Most fundamentally, Title VII is "a statute outlawing employment discrimination based on race, color, religion, sex, or national origin [and] has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society." *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring). In addition, although Title VII may sometimes require that the employer provide an employee with "special" or "preferential" treatment in response to the employee's religious beliefs, such "treatment of religious practitioners does not

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[4] *See Protos* v. *Volkswagen of America, Inc.*, 797 F.2d 129, 137 (3d Cir.), cert. denied, 479 U.S. 972 (1986); *McDaniel* v. *Essex Int'l, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley* v. *Martin Marietta Corp.*, 648 F.2d 1239, 1244-1246 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Nottelson* v. *Smith Steel Workers D.A.L.U.*, 643 F.2d 445, 453-455 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Hardison* v. *Trans World Airlines, Inc.*, 527 F.2d 33, 43-44 (8th Cir. 1975), rev'd on other grounds, 432 U.S. 63 (1977). Contrary to petitioner's assertion (Pet. 10), the district court's conclusion in *Isaac* v. *Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980), that Title VII's reasonable accommodation requirement violates the Establishment Clause does not present a "conflict" warranting further review. This Court reviews circuit conflicts and not conflicts between district courts and courts of appeals.

present the dangers of 'sponsorship, financial support, and active involvement of the sovereign in religious activity,' against which the Establishment Clause is principally aimed" (*Hardison,* 432 U.S. at 90-91 n.4 (Marshall, J. dissenting) (quoting *Walz* v. *Tax Comm'n,* 397 U.S. at 668)). See *Bowen* v. *Roy,* 476 U.S. 693, 712 n.19 (1986).[5]

Nor, contrary to petitioner's suggestion (Pet. 11), does this Court's recent decision in *Estate of Thornton* v. *Caldor, Inc., supra,* compel a different result. As this Court recently explained in *Corporation of the Presiding Bishop* v. *Amos,* slip op. 9 n.15 (citation omitted), the Court in *Caldor* struck down the state statute challenged on Establishment Clause grounds because the statute gave "the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees." As previously described, Title VII's reasonable accommodation requirement is not similarly infirm because it is limited to those actions that do not result in the imposition of significant burdens on the employer or other employees. See *Estate of Thornton* v. *Caldor, Inc.,* 472 U.S. at 712 (O'Connor, J., concurring) ("Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an antidiscrimination law rather than an endorsement of religion or a particular religious practice.").

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[5] Title VII's requirement of religious accommodation has much in common with the requirement of accommodation implicit in the Free Exercise Clause, which clearly cannot be deemed to violate the Establishment Clause. See, *e.g., Hobbie* v. *Unemployment Appeals Comm'n,* No. 85-993 (Feb. 25, 1987); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Sherbert* v. *Verner,* 374 U.S. 398 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1988

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